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Draft Statement of Policy #33
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McDannel, Michael

From: Phil Jossi <PJossi@riverdalebank.com>
Sent: Tuesday, October 22, 2013 12:04 PM
To: McDannel, Michael
Subject: Statement of Policy #33

Dear Mr. McDannel,

As the former President of Nebraska Electronic Transfer System, Inc., (NETS), current board member, and Nebraska Banker for the past 39 years, I have been extremely interested in the original issuance of Statement of Policy #33, a year or so ago, as it altered the long standing interpretation and application of Neb. Rev. Stat. 8-157.01. Without rehearsing all that has taken place over the past months regarding the "interpretation" of the law, I simply wish to say I appreciate the departments willingness to request an option from the Attorney General relative to the issue and then revise the SOP in consideration of the AG's findings relative to non-discriminatory access and equal fees.

As a bank shareholder it is very important that I know, clearly, my responsibilities under the statute regarding the interchange I charge and receive at my ATM as well as when my cardholders are at other Nebraska financial institution ATM's. Non-discrimination and equal fees have been the hallmark of the Nebraska ATM playing field since the beginning of ATM's in the state. The current proposed SOP #33 appropriately clarifies this again and I strongly support the reissuance of the SOP.

I have been in contact with current Management at NETS and I believe they will have a few minor proposed and suggested revisions that you will receive for even further clarification and I would support their inclusion as well.

Again, I wish to thank you and the department for your continued diligence in resolving this issue as it applies within the context of law.

Sincerely,
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October 22, 2013

Michael McDannel
Department Legal Counsel/Financial Institutions
State of Nebraska
Department of Banking and Finance
P.O. Box 95006
Lincoln Nebraska 68509-5006

Dear Mr. McDannel:

Thank you for the opportunity to comment on the revisions to Statement of Policy #33 relating to Neb. Rev. Stat. § 8-157.01. We are submitting this comment on behalf of First National of Nebraska, Inc., a financial holding company headquartered in Omaha, Nebraska, and its financial institution subsidiaries: First National Bank of Omaha, Omaha, Nebraska; First National Bank, North Platte, Nebraska; Platte Valley State Bank and Trust Company, Kearney, Nebraska; First National Bank and Trust Company of Columbus, Columbus, Nebraska; and Fremont National Bank and Trust Company, Fremont, Nebraska.

We would like to confine our comments to the section of SOP #33 titled "Point-of-Sale Terminal" and referenced at Section 8-157.01(5).

It appears that Section 8-157.01(5) refers to a type of terminal (distinguished from an automatic teller machine) that allows a cardholder to visit a retailer and acquire cash rather than make a purchase. However, the terminology is both confusing and has little relevance to what happens in the current market place.

We believe that Section 8-157.01(5) is irrelevant in relation to the current practices of the card acceptance industry, specifically the acceptance of payment cards by retailers. However, we are concerned that its continued existence may cause confusion in the market place.

We would suggest that any formal implementation of this section of SOP #33 be delayed pending a review of the relevance and applicability of Section 8-157.01(5) in light of current industry practices.

Sincerely,

A handwritten signature in black ink, appearing to read "N. W. Baxter".

Nicholas W. Baxter
Chief Risk Officer
First National of Nebraska, Inc.



10/22/2013

Michael McDannel
Department Legal Counsel/Financial Institutions
Nebraska Department of Banking and Finance
1526 K Street, Suite 300
Lincoln, NE 68508-2732

Re: *Proposed Revisions to Statement of Policy No. 33*

Dear Mr. McDannel:

I am writing on behalf of Metro Credit Union ("MCU") to provide comment on the proposed revisions to the Department's Statement of Policy No. 33 (the "SOP") on electronic terminal access and transaction switching. MCU believes that additional clarification of the SOP is needed in order for the SOP to accurately reflect application of Neb. Rev. Stat. 8-157.01 to the fundamentally different ATM and point-of-sale ("POS") transaction processing as it occurs in the marketplace today as compared to when the statute was written. The wording of the proposed statement is somewhat ambiguous, and portions of it seem inconsistent with the language of the statute in today's context, and (in the case of point of sale transactions) also inconsistent with federal law.

Neb. Rev. Stat. Section 8-157.01 requires financial institutions to make their ATMs available for other institutions on a nondiscriminatory basis. Similarly, the statute requires switch networks to provide switch transactions on a nondiscriminatory basis. The SOP provides analysis and examples under the assumption that establishing financial institutions set and charge fees to user financial institutions for the use of establishing financial institution ATMS. Establishing financial institutions in Nebraska no longer set or charge fees to user financial institutions. Basing the SOP on that out of date assumption diminishes the accuracy and usefulness of the illustration provided in Appendix A.

Imposition of Fees for ATM and POS Transactions

In order for the SOP to make sense in today's environment, it is critical that the department recognize the manner in which fees for ATM and point of sale transactions are set and charged. For both POS and ATM transactions, acceptance and use of cards is accomplished through participation in networks. One institution does not enter into an agreement with another for an ATM transaction. Rather, both institutions participate in a network. The network sets the fee it will charge the user financial institution for transactions initiated by the user institution's customers. This fee includes both a "switch" fee that is retained by the network and an

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interchange fee that is passed on to the establishing financial institution.¹ Frequently, the interchange fee charged by the network to the user institution is not the same as the interchange fee passed on to the establishing institution. More to the point, the establishing institution does not even know the fee charged to the user institution.

The only fee that an establishing financial institution "charges" in connection with an ATM transaction is the surcharge that is permitted by Neb. Rev. Stat. Section 8-157.01(4). A surcharge is imposed directly on the consumer that uses the ATM through a direct deduction to their account made as part of the transaction that they initiate. The establishing financial institution "sets" the surcharge – i.e., it determines the amount of the surcharge. It also "charges" the surcharge, because the surcharge is collected by issuing a direct charge to the cardholder's account (usually as part of the transaction). For example, if the establishing financial institution imposes an ATM surcharge of \$1.50 on a \$50 transaction, the cardholder's account will be charged \$51.50 for the transaction.

By contrast, the switch fee and the interchange fee are charged to the user financial institution by the ATM network, usually by means of a monthly invoice. The network also pays the establishing financial institution its share of interchange fees on a periodic basis. By participating in the network, financial institutions are agreeing to pay the switch and interchange fees set by the network, and agree to receive the interchange fees set by the network. Establishing financial institutions do not set the fees and have no control over those fees. For this reason, the interpretation of the statute and central premise of the SOP, contained in the first bullet point following the second illustration in Section 3 of Exhibit A (pg. 33-5), is not possible today as it was when the statute was written. Because Bank A does not set or charge a fee, Bank A does not have the ability to charge Bank Y and Bank Z the same fee.

Application of Neb. Rev. Stat. 8-157.01 to Current Operating Environment

In the commercial setting described above, Neb. Rev. Stat. 8-157.01's nondiscrimination requirements prohibit an ATM or POS network from charging different switch and interchange fees to different user financial institutions unless it can be shown that the difference is nondiscriminatory. Because financial institutions do not set switch or interchange fees, the statute does not prohibit financial institutions from receiving different amounts of interchange income from different networks. Nor does the statute prohibit an institution from participating in more than one network. For example, MCU may participate in two different networks – Network A and Network B. Network A and B may charge different interchange fees

¹ For a good discussion of this process, see "ATM Surcharges," *Current Issues In Economics and Finance*, Vol. 4, No. 4 (April, 1998), Federal Reserve Bank of New York, which can be accessed at: http://www.newyorkfed.org/research/current_issues/ci4-4.pdf.

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for transactions at an MCU ATM, as long as Network A charges the same fee to all of its Nebraska user institutions and Network B similarly charges a uniform fee to all of its Nebraska user institutions.

This interpretation is consistent with both the statutory language and the policy that it embodies. Under the scenario described above, MCU's ATMs would be available on an equal basis to all user institutions in Nebraska. User institutions could choose whether to access MCU's ATMs through Network A or Network B. Network A's interchange fees (passed back to MCU) would be uniform throughout the state, and Network B's interchange fees would be equally uniform throughout the state. More importantly, because each network's transactions must be available on a nondiscriminatory basis, and each institution's ATMs must be available on a nondiscriminatory basis, user institutions have choice among the two networks and are free to choose the network that best and most efficiently or cheaply meets their needs. Consumers benefit from the increased competition and reduced cost.

In evidence thereof, following the Department's approval of more than one "switch" in Nebraska, MCU was able to change card processors. Despite receiving 67% less interchange for user financial institution transactions at MCU ATMs, MCU's total net cost for PIN based transactions decreased by an annualized \$200,000.00 per year. Real world profit and loss experience in today's competitive market supports the statute's original purpose of ensuring ATM access for small financial institutions, like MCU.

Requested Changes to the Draft SOP

With this in mind, we believe it would be appropriate to revise Appendix A in several respects. The second and third paragraphs of Section 1 should be deleted, because it is both irrelevant and misleading in today's processing environment. The "terminal fee" is actually an interchange fee that is set by the network. Bank A and Bank B are not responsible for setting the "terminal fee." At the very least, the paragraphs could clarify that if Bank A and Bank B do not directly charge a "terminal fee" but only receive interchange income set by the network(s), the nondiscrimination requirements apply to the interchange fees set by the networks, not the interchange income received by Bank A and Bank B.

We believe this section should also directly address interchange fees set by the networks, and should indicate that Network A must charge the same interchange fee to all user institutions and Network B must also charge the same interchange fee to all user institutions, but that the two networks may charge fees that are different from each other, and that establishing financial institutions may participate in both networks irrespective of the fact that interchange fees charged by one are different than interchange fees charged by the other.

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In addition, the illustration in Section 3 should be changed slightly, along with the bullet points underneath the example. The example should be altered such that Customer No. 3 is a customer of Bank Y rather than Bank Z. The first bullet point should be deleted, because in reality Bank A does not charge either Bank Y or Bank Z any ATM fees. To the extent that the first bullet point remains, it should be clarified to reflect that fees imposed by Switch D and Switch E are not treated as fees charged by Bank A for purposes of this analysis.

For the same reasons, the second bullet point should be deleted. A new bullet point should be added to indicate that Switch E must charge the same fees to Bank Y and Bank Z for Customers No. 3 and 4.

Finally, another bullet point should be added to indicate that Bank A does not violate the statute simply because Switch D and Switch E impose different fees on Bank Y and Bank Z for transactions at Bank A's ATM. Bank A makes the ATM available on a nondiscriminatory basis. Other banks may choose to participate in Switch Network D or Switch Network E and will be charged applicable interchange fees by those networks. If Switch E imposes a lower fee than Switch D, Bank Z may obtain the advantage of the lower fee for Bank A ATM transactions by becoming a participant in the Switch Network E.

Because Bank A does not set the switch or interchange fees charged by Switch D and Switch E, it would make no sense to impose a requirement that transactions done at a Bank A ATM through Switch D must result in the same fee to Bank Y as a Bank A ATM transaction performed through Switch E. Certainly the text of the statute does not compel such a conclusion. Moreover, reading the statute in such a manner would either require Bank A to use only one switch network, or would require collusion between Switch Networks D and E regarding fees they will charge to user institutions for ATM transactions at Bank A. Neither of those results is good public policy.

We believe that consideration of the statute in the context of the current ATM processing systems rather than the fee environment that existed when the statute was written, and revising the SOP as recommended here, allows the current market to function efficiently. It permits user financial institutions to be protected from price discrimination at ATMs because they have freedom to choose their own switch network and requires consistency within a switch network.

Impact of Durbin Amendment Regarding POS Transactions

With respect to point of sale transactions, it is significant to note that the Durbin Amendment to the Dodd-Frank Act, codified at 15 U.S.C. § 1693o-2, as implemented by Federal Reserve Regulation II, 12 C.F.R. Part 235, requires issuers to permit presentation of debit card transactions on at least two unaffiliated networks. A reading of the Nebraska statute to require

Michael McDannel

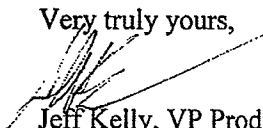
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Bank A to use only one payment processing network (in order to assure uniform fees charged to all institutions) would violate the plain language of the Durbin Amendment. To the extent that the Nebraska statute is read to require POS networks to collude on fees imposed for transactions in order to assure uniformity, it would certainly violate the spirit, if not the letter, of the Durbin Amendment. The purpose of the Durbin Amendment was to provide merchants with options in selecting payment networks in order to reduce prices. Price collusion (which in the antitrust world is treated as an anticompetitive practice) achieves the exact opposite result.

Thank you for allowing us the opportunity to provide comment on this proposed SOP. Please feel free to contact me with any questions.

Very truly yours,


Jeff Kelly, VP Products & Technology



October 23, 2013

Michael McDannel
Legal Counsel/Financial Institutions
Nebraska Department of Banking & Finance
1526 "K" Street, Suite 300
Lincoln, NE 68508

Re: Comments regarding proposed revisions to Statement of Policy #33, "Electronic Transaction Fees"

Dear Mr. McDannel:

The Nebraska Credit Union League (NCUL) appreciates the opportunity to submit comments regarding the proposed revisions to Statement of Policy #33, "Electronic Transaction Fees".

NCUL supports the Department's efforts to clarify the requirements established by Neb. Rev. Stat. § 8-157.01 which sets forth the standards for the operation and use of automated teller machines (ATMs) and other facets of electronic transmissions by financial institutions in the State of Nebraska.

Since the enactment of LB 269, § 2 in 1975 the electronic banking landscape has changed significantly. These changes have also served to generate varying interpretations of the statutes by interested parties. As a result, we believe that perhaps it is time that the entire electronic banking statutes and rules be reviewed. Such a review could create a marketplace that encourages competition among networks by attempting to strike a balance between providing the lowest price to network members for switching transactions and providing a sufficient and responsible return to ATM owners.

No matter how well intentioned, the current electronic banking provisions, in our opinion, have created the unintended consequence of producing an anti-competitive effect on the pricing of ATM and network services to Nebraska consumers. It is difficult to believe that such a circumstance would have been within the contemplation of the Nebraska legislature.

As I expressed earlier, changes in the electronic banking environment may require a holistic review of the issues relating to Neb. Rev. Stat. § 8-157.01. However, based on previous conversations, I

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intend to address the proposed revisions to Statement of Policy #33 as they relate specifically to Question #4 in the Department's opinion request.

Background:

In 1999, a group of credit unions formed the Nebraska ATM Credit Union Service Organization (CUSO) for the purpose of creating a cost-effective method of providing ATM services to their members within the parameters of Nebraska law. On September 2, 1999 the group received an opinion letter from the Department indicating that the proposed ownership agreement was in compliance with Neb. Rev. Stat. § 8-157.01. We believe this was opined through the provision in Section 8-157-15 (e) *Affiliate financial institution means any financial institution which is a subsidiary of the same bank holding company* such that the CUSO created a common ownership similar in nature to a bank holding company.

At the Department's request, the Nebraska Attorney General's Office issued an opinion on June 27, 2013, relating to the non-discriminatory operation of and fees for switches used by Automatic Teller Machines and other equipment to transmit electronic information for financial institutions in Nebraska. The Attorney General's Opinion directly cites in its concluding paragraph "switch services". It states the prohibition against a group of financial institutions forming an entity to provide switch services which would charge its group members a different price for switch services than the prices for those services charged to non-members. We believe the distinction between switch fees and transaction fees is imperative and that the Attorney General's Opinion does not specifically address transaction fees.


We believe the opinion raises four specific questions which need additional clarification in relation to the Nebraska ATM CUSO:

1. What, if any, bearing does the June 27th Attorney General's Opinion have on the operations of the Nebraska ATM CUSO as approved by the Department on September 2, 1999?
2. The AG opinion states: *"Finally, since all financial institutions using a particular switch transaction must be charged the same price, a group of financial institutions cannot form an entity to provide switch services and then charge its group members a different price for switch services than the prices for those services charged to non-members."* What is the relevance of this comment to the CUSO arrangement we have? This comment is referring to switch fees as we read it and not to the transactional fees charged between institutions.
3. Should the Department find differently, what remedies would be available to ensure the continued and complete operation of the Nebraska ATM CUSO?
4. Would the Department support a technical change in Section 8-157-15 (e), *Affiliated financial institution means any financial institution which is a subsidiary of the same bank*

holding company, *OR a Relationship between one or more entities that creates common ownership of one or more ATMs among the entities?*

We understand that the pricing of ATM and electronic services in Nebraska involves complex issues of market structure, competition and public policy. We thank the Department for the opportunity to express our views on the proposed revisions to Statement of Policy #33, "Electronic Transaction Fees". If you have any questions about our comments, please do not hesitate to contact me at (402) 333-9331, ext. 203.

Sincerely,

A handwritten signature in cursive script, reading "J. Scott Sullivan".

J. Scott Sullivan
President/CEO

McDannel, Michael

From: Alan Fosler <Alan.Fosler@ubt.com>
Sent: Wednesday, October 23, 2013 1:52 PM
To: McDannel, Michael
Cc: Cathy M. Morrissey
Subject: Revised Statement of Policy #33

Michael McDannel, Legal Counsel
State of Nebraska Department of Banking

Thank you for the opportunity to comment on the revised Statement Of Policy #33. As background information, I have served as a past Chairman of the Nebraska Electronic Transfer System for ten years, and I am currently a Board Member with over twenty-five years of service in that capacity, and feel that I am very familiar with the general operating procedures and direction of the organization. Additionally, I have been employed by Union Bank and Trust Company for over forty years working primarily in the bank's operation division which includes electronic banking services. I also currently serve on the Federal Reserve Bank of Kansas City's Payment Advisory Group, and I am a Board Member of EPCOR, the Electronic Payments Core of Knowledge.

The purpose of my comments are to endorse the revised Statement Of Policy #33 and how it now accurately reflects the intention, practice, and established guidance that the Nebraska Electronic Transfer System has and will continue to follow. As a Board Member, and as a Banker, I have been involved in various meetings with NETS staff and counsel as well as members of the Nebraska Department of Banking to review and discuss the original intentions and impact of Statement Of Policy #33. In its current revised form the Statement of Policy #33 would serve to clarify responsibilities and provide proper guidance for all participants in the network. I would encourage you to adopt and publish the revised policy statement. Thank you for your consideration.

Respectfully,

Alan Fosler



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October 23, 2013

Via Hand

Michael McDannel
Department Legal Counsel/Financial Institutions
Nebraska Department of Banking and Finance
P.O. Box 95008
Lincoln, NE 68509-5006

RE: Proposed Revisions to Statement of Policy #33, "Electronic Transaction Fees"

Dear Mr. McDannel:

MasterCard Worldwide ("MasterCard")¹ submits this comment letter to the Nebraska Department of Banking and Finance ("Department") to provide MasterCard's views in response to the Department's proposed revisions ("Proposal") to its Statement of Policy #33, "Electronic Terminal Access and Electronic Switching of Transactions" ("SOP"), which was issued in response to the Nebraska Attorney General's June 27, 2013 opinion letter ("Opinion Letter"). MasterCard appreciates the opportunity to provide comments on the Proposal, both in our written responses and in our meeting with the Department.

Before proceeding with our comments, we wish to register our deep concern regarding the application of the SOP to global retail payment systems, such as MasterCard. We have recently become aware of legislative history regarding the 1975 enactment of the Nebraska statute that the SOP interprets, and we believe that any fair reading of that history leads to the certain conclusion that the statute was intended to apply only to Nebraska Electronic Transactions System, Inc. Our comments below will evidence the serious problems raised by application of the SOP or the underlying statute to MasterCard, which could all be addressed through an appropriately narrow interpretation of the term "switch" in the Nebraska statutes.

¹ MasterCard advances global commerce by providing a critical link among financial institutions and millions of businesses, cardholders and merchants worldwide. In the company's roles as a franchisor, processor and advisor, MasterCard develops and markets secure, convenient and rewarding payment solutions, seamlessly processes more than 34 billion payments each year, and provides analysis and consulting services that drive business growth for its banking customers and merchants. With more than 1.15 billion cards issued through its family of brands, including MasterCard®, Maestro® and Cirrus®, MasterCard serves consumers and businesses in more than 210 countries and territories, and is a partner to more than 20,000 of the world's leading financial institutions. With more than 35.9 million acceptance locations worldwide, no payment card is more widely accepted than MasterCard.

In General

Neb. Rev. Stat. §8-157.01 defines the terms under which financial institutions may establish automatic teller machines ("ATMs") and point-of-sale terminals ("POS terminals"), each of which allows account holders at depository institutions to access their funds (either for cash withdrawals or to make purchases from merchants) through use of a personal identification number. The statute also provides for the establishment of "switches," which are defined as "any facility where electronic impulses or other indicia of a transaction originating at an automatic teller machine or point-of-sale terminal are received and are routed and transmitted to a financial institution, data processing center, or other switch, wherever located." § 8-101(14). Section 8-157.01 contains a non-discrimination requirement, which provides that "no discrimination shall exist or preferential treatment be given in either the operation of [a] switch or the charges for use thereof."

The Opinion Letter addressed a series of questions from the Department regarding this non-discrimination requirement. In response to those questions, the Nebraska Attorney General determined that the switch non-discrimination requirement required that switch operators must offer each type of transaction at the same price to each Nebraska financial institution participating in the switch. The Proposal modifies the Department's rules as a result of the interpretations contained in the Opinion Letter.

Before providing our detailed comments on the Proposal, we believe it would be useful to explain in some detail how the MasterCard system is operated.

Background on MasterCard

MasterCard is a technology company that operates a global retail payment system. However, MasterCard does not issue payment cards of any type (credit, debit or prepaid), nor does it contract with merchants to accept those cards. In MasterCard's payment system, those functions are performed in the United States by numerous banks. MasterCard refers to the banks that issue payment cards bearing the MasterCard brands as "issuers." MasterCard refers to the banks that enter into contracts with merchants to accept MasterCard-branded payment cards as "acquirers."

As a retail payment system operator, MasterCard provides the networks through which issuers and acquirers can interact to complete payment transactions, and sets certain rules regarding those interactions. MasterCard also owns the MasterCard family of brands and licenses issuers and acquirers to use those brands in conducting payment transactions. A typical transaction processed over MasterCard's networks involves four parties in addition to MasterCard: the cardholder, the merchant, the issuer and the acquirer. Consequently, MasterCard is often referred to as a "four-party" payment system.

MasterCard's Comments on the Proposal

Definition of "Nebraska Financial Institution"

The Proposal defines the term "Nebraska financial institution" to mean "any state-chartered or federally chartered bank, savings bank, building and loan association, savings and

loan association, or credit union, or a subsidiary of any such entity that establishes an ATM or POS terminal within the State of Nebraska, and switches that route electronic transactions for a Nebraska financial institution's ATM and/or its POS terminal." We respectfully submit that this definition is overbroad in two key respects.

First, the definition of "Nebraska financial institution" should be limited to financial institutions that are headquartered in Nebraska, and should not include financial institutions that merely have a branch, ATM, or POS terminal in-state. As the Opinion Letter notes, the purpose of Section 8-157.01 was "to provide an equal opportunity for every state and national bank in Nebraska, regardless of size or location to, if they so desire, compete for funds in an electronic banking environment." Opinion Letter at 8. When the predecessor statute that became Section 8-157.01 was enacted in 1975, interstate branching was prohibited, so any financial institution covered by the statute would have been headquartered in Nebraska. Thus, it is clear that the original intent of the Legislature was to protect only Nebraska-headquartered banks. Also, as the Opinion Letter notes, "the separate language . . . pertaining to discrimination and switches has remained essentially the same for almost forty years." Opinion Letter at 6. There is thus no reason to believe that the Legislature intended any more recent legislative action (e.g., recodification) to expand the coverage of the provision.

Second, we request that the Department revise the definition to exclude switches. The statutory definition of "financial institution" is limited to "a bank, savings bank, building and loan association, savings and loan association, or credit union, whether chartered by the United States, the department, or a foreign state agency; any other similar organization which is covered by federal deposit insurance; or a trust company." Neb. Rev. Stat. § 8-101(12). The definition of switch, furthermore, confirms that a switch is not a financial institution, by stating that a switch "route[s] and transmit[s]" transaction data "to a financial institution, data processing center, or other switch." § 8-101(14) (emphasis added). Had the Legislature meant for the term "financial institution" to subsume the term "switch," it would not have listed them both.

Also, neither the statute nor the Opinion Letter requires payment networks, such as MasterCard, to provide equal access or pricing for data processors and other types of switches. By including switches in the definition of "Nebraska financial institution," the Proposal would require MasterCard to provide switching services to its direct competitors, including Visa, American Express, and Discover.

While we appreciate that the Department may wish to include switches in the definition of "Nebraska financial institution" as a way to ensure that Nebraska banks that receive switching services through arrangements with data processors receive the benefit of the non-discriminatory fees aspect of the statute, we submit that there are alternative ways to accomplish this objective without adverse consequences. Specifically, Nebraska banks may contract directly with MasterCard, and no bank is required to contract with a data processor as a prerequisite for participating in the MasterCard system. That is, every financial institution that the statute was intended to cover is capable of ensuring that it receives the same pricing as all other Nebraska financial institutions by contracting directly with MasterCard. Those that choose not to do so make that choice voluntarily; they will not be deprived of any benefit under the law if the SOP uses a definition of "Nebraska financial institution" that does not include switches.

Definition of "Switch Fee"

The Proposal defines a "switch fee" as "all costs and benefits associated with an ATM, POS terminal, or switch transaction," including "all transactional charges, a signing bonus, a membership fee, volume pricing, discounts, the awarding of 'prizes,' period(s) when fees are not charged, incentive pricing, and related items." We believe that the statute is more properly read to imply a narrow definition of switch fee, as described below.

First, we request that the switch fee definition include only amounts that are part of the fee-per-transaction pricing. Both the statute and the Opinion Letter are directed at this more limited cost. The statute provides that "no discrimination shall exist or preferential treatment be given in . . . the charges *for use*" of a switch, and states that the use of a switch shall be "without discrimination as to *cost of its use*." Neb. Rev. Stat. §8-157.01(10) (emphasis added). The Opinion Letter similarly interpreted this provision to conclude that it required all financial institutions using a switch transaction to be "charged the same price for that switch transaction." Opinion Letter at 8.

Nothing in either the statute or the Opinion Letter prohibits a switch operator from paying amounts to financial institutions to encourage greater usage of that switch (*e.g.*, lump-sum bonus payments based on volume), so long as the switch charges the same fee for the same type of transaction. In any event, payments of this nature would not discriminate among financial institutions if they are available to all qualifying Nebraska financial institutions. Permitting payments based on reaching volume thresholds also would assist in the overall goal of making transactions that require the use of switches more available to Nebraska residents, by incentivizing financial institutions to encourage the use of debit cards.

Second, we request that the Department clarify that the definition of "switch fee" covers only the cost of an ATM or POS terminal switch transaction. The switch transaction itself contains two components: (1) the requesting of authorization for a transaction from the payment network; and (2) receiving a reply message. However, financial institutions that establish ATMs and POS terminals often purchase various other services from payment networks; for example, fraud prevention services. These services are voluntarily selected and are not in any way required in order for switching services to work properly. They are separate from the transmission of data through a switch. The requirement that switch operators charge the same price for each switch transaction should not be extended to charges that are associated with, but not part of, the transaction that is switched.

Finally, we ask that the Department modify the SOP to explain that the switch fee restriction applies only to transactions at ATMs and POS terminals that are established *and operated* by depository institutions themselves. Some banks may lend their banking status to non-banks, so that the non-banks can establish and operate ATMs and POS terminals without needing to obtain bank licenses. These arrangements benefit non-banks, are outside the intended scope of the statute and should not be covered by the switch fee restrictions.

Additional Comments

While the comments above describe the majority of our concerns with respect to the Proposal, we also wish to address two additional aspects of the Proposal.

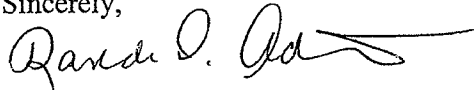
We would request that the Department revise the Proposal to make it clear that the SOP applies only to fees charged *by a switch operator* to Nebraska financial institutions. In some instances, a financial institution will contract with MasterCard, and then contractually pass the services on to other financial institutions. In such cases, we have neither knowledge of, nor control over, the fees charged to these secondary users of the MasterCard network; we only control the prices charged to our direct customers.

Finally, we agree with the Department's determination that the switch fee non-discrimination provision applies only to financial institutions that *establish* ATMs and POS terminals, and not to institutions that merely issue cards used at those ATMs and terminals. The statute was not intended to benefit this latter group of financial institutions. Instead, its purpose was to permit Nebraska financial institutions to "if they so desire, compete for funds in an electronic banking environment." Opinion Letter at 8. For purposes of switch transactions, that competition applies to the establishers of ATMs and POS terminals, and not to other financial institutions.

* * *

MasterCard appreciates the opportunity to provide comments on the Proposal. If there are any questions regarding our comments, please do not hesitate to contact the undersigned at (914) 249-6715 or randi_adelstein@mastercard.com, or our counsel at Sidley Austin LLP in this matter, Joel D. Feinberg, at (202) 736-8473.

Sincerely,



Randi D. Adelstein
Vice President, Senior Managing Counsel
U.S. Regulatory and Public Policy

cc: Joel D. Feinberg



Alex Miller
Senior Associate General Counsel
Global Business Operations

October 23, 2013

John Munn, Director
Michael McDannel, Department Legal Counsel
Nebraska Department of Banking and Finance
1526 K Street, Suite 300
Lincoln, Nebraska 68508-2732

RE: Proposed Statement of Policy #33

Gentlemen:

Visa appreciates the opportunity provided by the Nebraska Department of Banking and Finance ("NDBF" or the "Department") to comment on the proposed draft of Statement of Policy #33 (the "Proposed SOP"), which the Department released on October 4. The Proposed SOP would amend the current outstanding Statement of Policy #33 ("SOP #33").

As you are aware, Visa submitted a letter to the Department in August of last year (the "2012 Visa Letter") concerning the issues raised by SOP #33 and correspondence from NDBF indicating that Visa may be conducting switching activity requiring Visa to register as a switch under Nebraska Revised Statute Section 8-157.01. As set forth in Visa's prior letter, Visa does not believe it is a "switch" as defined under Nebraska law, including as that law had been interpreted and enforced for over 37 years. We incorporate herein, and reattach as Exhibit A, the background description of the Visa system that we included with the 2012 Visa Letter.

Earlier this year, the Nebraska Attorney General issued an opinion regarding the non-discrimination provisions of Section 8-157.01 (Nebraska Attorney General Opinion #13-001, Neb. Rev. Stat. § 8-157.01: Non-discriminatory Operation Of And Fees For Switches Used By Automatic Teller Machines And Other Equipment To Transmit Electronic Information For Financial Institutions in Nebraska, 6/27/2013 ("AG Opinion 13-001"). It is our understanding that the issuance of AG Opinion 13-001 is the basis for the Department's proposed revisions to SOP #33.

We note that the question of whether Visa, a global electronic payments company, is a switch was not addressed in AG Opinion 13-001 or the Proposed SOP. Visa continues to maintain that it is not a "switch" for purposes of Section 8-157.01, SOP #33, or the Proposed SOP. Nevertheless, without prejudice to the 2012 Visa Letter, we note a few items in the Proposed SOP which we respectfully request that the Department reconsider.

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I. Request for Limitation on the Overly-Broad Inclusion of All Costs and Benefits Associated with ATM and POS Transactions

We request that the Department reconsider its determination in the Proposed SOP that "all costs and benefits associated with an ATM, POS terminal, or switch transaction are included in the definition of 'fee'" and therefore subject to the non-discrimination requirements. This expansive reading of Section 8-157.01 is also reflected in the non-exhaustive list of examples of "fees" cited by the Department: "all transactional charges, a signing bonus, a membership fee, volume pricing, discounts, the awarding of 'prizes,' period(s) where fees are not charged, incentive pricing, and related items." We recommend certain modifications to this Proposed SOP definition below.

The proposed language seems to unreasonably expand the intent of the Unicameral, as interpreted by the Nebraska Attorney General in AG Opinion 13-001, and to inadvertently create potential violations of the Proposed SOP by well-intentioned financial institutions and switches. AG Opinion 13-001 discusses the prohibition on discrimination or preferential treatment only in reference to "charges for the use of a switch."¹ The Opinion goes on to state "i.e.", meaning, "that is to say", the Attorney General interprets Section 8-157.01 to require "the same price" be charged for that "switch transaction." It is notable, we believe, that the Attorney General focused solely on charges for the switch transaction itself, as opposed to the arguably broader interpretation by the Department of the term "charges" to include costs and benefits associated with the transaction.² We believe the Attorney General's interpretation is in keeping with the plain language of the statute itself, which only refers to "charges for use" of a switch,³ and is consistent with the floor debate at the Unicameral at the time of adoption of Section 8-157.01 during which the Senators talked about assessing charges to the user bank "based on the cost per item."⁴ The Department's interpretation, however, appears to unilaterally expand the universe of applicability of the statute beyond the language of the statute itself and the Attorney General's Opinion.

Visa is concerned that an overly broad definition of charges for use of a switch that are subject to the non-discrimination requirements could bring in scope various fees which are not related to the use of a switch. For example, membership fees in a global network such as Visa typically cover the entire range of services provided by the network to its members and are not attributable solely to ATM or debit POS usage, either generally or with respect to more limited Nebraska-to-Nebraska transactions. In addition, there are a number of network-based fees that are not charges directly for "switching" a transaction,

¹ AG Opinion No. 13-001 at 8.

² "It provides that there shall be no discrimination or preferential treatment in the charges for the use of a switch, i.e., all financial institutions which use a particular switch transaction should be charged the same price for that switch transaction." *Id.* at 8 (emphasis added).

³ See Neb. Rev. Stat. § 8-157.01(10).

⁴ Senator Murphy, LB 269 84, Leg., (Neb. April 28, 1975), p. 2798.

but which might be interpreted as “associated with” the handling of an ATM, POS or switch transaction, under the language of the Proposed SOP. For example, the Proposed SOP could be interpreted to include fees related to auxiliary services such as fraud management tools. We believe such an interpretation would inappropriately expand the intent of Section 8-157.01 and AG Opinion 13-001 far beyond charges specifically for “switching” the transaction, to other fees a network might charge even for optional, value-added or other services offered on commercial terms, rather than the mere “switching” of the transaction.

The inclusion of “benefits” as well as “costs” within the definition of “fees” also goes beyond the non-discrimination requirement of Section 8-157.01(10), which only references “charges...” “for use of” the switch. The Proposed SOP’s inclusion of benefits also seems to ignore the intent of the Legislature in several statutory provisions to protect the benefits available to Nebraska user financial institutions, such as interchange revenue payable to them by the establishing financial institution when an electronic funds transfer is initiated at a point-of-sale terminal.⁵ As addressed in more detail below, the vague reference to “all benefits associated with” a switched transaction risks significant unintended consequences. Moreover, as discussed above, the Proposed SOP goes beyond not only the statute, but also the interpretation of the Attorney General in AG Opinion 13-001, which interprets the term “charges” in a more limited way than the Proposed SOP, related to charging financial institutions the same price for a particular transaction by a switch, not with respect to the entirety of the institution’s relationship with the switch.⁶

As the technology and economic factors of electronic banking change, and the parties and formats of payment transactions evolve, this lack of clarity as to which fees must be non-discriminating could result in cautious banks and switches charging Nebraska financial institutions identical, but higher, fees. This will either decrease the profitability of these institutions compared to their competitors in neighboring states, or the fees will be passed through as higher costs to customers of Nebraska financial institutions. Neither of these results is consistent with the legislative goals of achieving access and fairness in electronic banking.

Recommended Revisions to the Proposed SOP:

In order to avoid the potential over-reaching and confusing aspects of the Proposed SOP, we recommend that the subsection captioned “Determining What Comprises an ATM, POS Terminal, or Switch Fee” be retitled and revised to read as follows:

⁵ Neb. Rev. Stat. § 8-157.01(5).

⁶ AG Opinion 13-001 at 8-9.

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"Determining What Comprises an ATM⁷ Fee

The Department has determined that the non-discrimination aspects of Section 8-157.01 should apply generally to transaction fees charged directly by Nebraska establishing financial institutions and by switches to a Nebraska user financial institution for processing an electronic ATM transaction by a customer of the user financial institution for the same transaction. For purposes of SOP #33, processing fees include those costs per transaction which are assessed by a switch against a Nebraska financial institution, whether an establishing financial institution or a user financial institution, based on the authorization, clearing and settlement of a specific transaction effectuated through an ATM."

Visa also requests that the Department revise the Proposed SOP to add the following new section to defer, pending further study, the determination of the scope of the Section 8-157.01 non-discrimination requirements relating to POS fees:

"Treatment of POS Fees under Section 8-157.01

Due to the potential market difficulties of subjecting POS fees to the non-discrimination requirements, the Department shall carry out an internal study and evaluation to determine whether it is necessary, in order to further the non-discrimination purposes of Section 8-157.01, to apply the non-discrimination aspects of Section 8-157.01 to POS fees. The study and evaluation shall, to the extent feasible, be based on information independently developed (by the Department) and information provided to the Department by interested parties. The Department's policy on the treatment of POS fees under Section 8-157.01 and the applicability of this SOP #33 to POS fees shall be deferred until such additional evaluation, study and consideration can be completed by the Department and applicable regulations subsequently promulgated."

To aid the Department in its review of our comments, we have included for your convenience Exhibit B which shows the Proposed SOP with the recommendations of our comment letter included.

II. Request for Clarification that the Non-Discriminatory Pricing Provisions Do Not Apply to Interchange Fees

We also respectfully request that the Department consider clarifying that the non-discriminatory pricing requirements do not apply to interchange, which could also be

⁷ For reasons discussed in the following section, Visa would recommend that this Proposed SOP be limited at this time to discussion of ATM fees and the determination of POS fees be deferred until additional evaluation and consideration can be completed by the Department.

inadvertently covered by the vague and overly broad definition of a switch fee as including "...all costs and benefits associated with an ATM, POS terminal or switch transaction." As interchange operates differently for ATM and POS transactions, we discuss each of these transaction types separately below. Neither the language of Section 8-157.01 nor AG Opinion 13-001 appears to provide that the non-discrimination principles apply to interchange set by a switch; adopting such a broad definition here could result in substantial changes to longstanding economics of ATM and POS transactions within Nebraska. At a minimum, the Department should consider expressly clarifying that interchange on a POS transaction – which is generally a revenue source to the card issuer (the user financial institution), rather than a cost – should be excluded from the definition of a "switch fee" that is subject to the non-discrimination requirement.

ATM Transactions

With respect to ATM transactions, a switch typically charges a "network processing fee" to ATM establishing institutions and card issuers that participate in the switch. Such processing fees are retained by the switch as payment for use of and access to the switch. (In accordance with the Department's prior interpretation of SOP #33, we understand that such participation fees may have varied for certain approved switches based on volume or types of tiers, or via commercial arrangements.)

In contrast, the term "interchange" on ATM transactions typically refers to the charge paid by the card issuing financial institution to *the financial institution establishing the ATM* (defined in Section 8-157.01(15)(g) as the "establishing financial institution," and also referred to in this letter as the "ATM Acquirer"). In the context of a payment card network that operates an ATM network such as Visa or PLUS, this charge is typically set by the network, unless the card issuer and ATM establishing financial institution have mutually agreed to a separate rate. To illustrate, on a \$100 ATM cash withdrawal processed over the Visa/PLUS ATM network, the ATM establishing financial institution will dispense \$100 to the cardholder, and the card issuing financial institution will be obligated to reimburse the ATM Acquirer through the Visa/PLUS settlement system for the \$100 cash that was dispensed plus an ATM "cash disbursement fee/interchange" (for illustrative purposes, an additional \$0.42). In addition, both the card issuer and the ATM Acquirer will pay a separate processing fee directly to Visa/PLUS. ATM "interchange" is therefore not a fee paid for use of or access to the switch; instead, although the rate or amount is typically set and applied to the transaction by the switch, it is a fee transferred from the card issuing financial institution to the ATM establishing financial institution, and the switch does not retain the interchange at all.

POS Transactions

With respect to POS transactions, we are concerned that the broad language of "all costs and benefits associated with a ... switch transaction" could also be unintentionally

read to include POS interchange, even though such interchange is generally a revenue stream to the card issuer (not a cost).

As with ATM transactions, payment networks such as Visa typically charge processing fees to acquirers and issuers for their participation in the network, and often charge fees for additional or optional services such as fraud management tools, loyalty programs, etc. Each network sets such fees in competition with other networks (and in competition with other forms of payment available to issuers and acquirers). Networks retain such processing or related fees as compensation for the use of and access to the network by such participants.

In contrast, POS interchange is distinct from a fee charged for use of or access to a network. Instead, POS interchange typically refers to an inter-bank fee paid by the POS acquiring bank, through settlement via the payment network, *to the card issuer*. As with ATM interchange, the interchange reimbursement fee is generally set by a payment network, although issuers and acquirers can vary such fees through bilateral agreements. To illustrate, in the context of the Visa or Interlink system, for a \$100 debit card purchase transaction, the card issuer will be required to pay the POS acquiring bank through the Visa/Interlink settlement system \$100 for the purchase transaction but the POS acquiring bank will be obligated to pay the card issuer POS interchange for this transaction (for illustrative purposes, \$0.95 if the card issuer is a small card issuer exempt from the federal interchange fee limitations discussed below or \$0.27 if the card issuer is subject to these federal interchange fee limitations).⁸

For Visa or Interlink debit POS transactions, there are myriad interchange fee rates depending on such factors as the type of merchant, type of transaction, method by which the transaction is authenticated, etc. Acquirers in turn typically charge their merchants a "merchant discount fee," an amount which is set independently through negotiations between the acquirer and its merchants, and which generally takes into account among other costs the interchange that will be paid by the acquirer to the issuer.

We do not believe that interchange for POS transactions was intended by the Nebraska legislature to be included within the scope of the non-discriminatory pricing provisions. In this regard, interchange paid by acquirers for a POS transaction is not paid by "user financial institutions" as contemplated within the scope of Section 8-157.01(5). Indeed, Section 8-157.01(5) evidences the legislature's express intent to exclude POS transaction interchange from the non-discrimination requirement of Section 8-157.01(5): "Nothing in this subsection shall prohibit payment of fees to a financial institution which issues an access device used to initiate electronic funds transfer transactions at a point-of-

⁸ In terms of the processing mechanics, the amount of interchange owed by the acquirer would be deducted from the settlement amount owed by the issuer through the payment network (*i.e.*, in this example, the issuer would transfer \$99.05 to the acquirer as settlement for the \$100 transaction).

sale terminal.” The switch-related provisions on non-discriminatory pricing, while they may be “more emphatic,” focus on the fees for use of and access to *the switch*.⁹ The switch provisions should not be read to override the core goal of ensuring non-discrimination in fees being charged to *the card issuer* (or user financial institution) whenever their customers use another financial institution’s POS terminal. Contrary to the broad language of “all costs and benefits” set forth in the Proposed SOP, nothing in the statute or the AG Opinion suggests that the law is intended to restrict *revenue received* by such card issuer from the establishing financial institution, whether directly or through a switch.¹⁰

If the Department were to view POS interchange fees as subject to the Section 8-157.01 non-discrimination provisions, we wish to point out that this interpretation would be particularly detrimental to smaller Nebraska financial institutions that issue debit cards, due to the interplay with the federal law cap on debit card interchange. The Dodd-Frank Wall Street Reform and Consumer Protection Act and Federal Reserve Board (the “Board”) Regulation II define “interchange transaction fees” as any fee established, charged, or received by a payment card network and paid by a merchant or an acquirer for the purpose of compensating an issuer for its involvement in an electronic debit transaction.¹¹ The amount of any interchange transaction fee that an issuer may receive or charge with respect to an electronic debit transaction is required to be reasonable and proportional to the cost incurred by the issuer with respect to an electronic debit transaction.¹² As currently formulated, Regulation II makes only large financial institutions subject to this federal cap on debit interchange; Regulation II provides for an exemption from the regulated interchange rate for certain cards, including debit cards issued by small issuers with assets of less than \$10 billion.¹³

⁹ AG Opinion 13-001 at 8.

¹⁰ *Id.* (“Construing the language in § 8-157.01 *pertaining to charges for switches* so as to require that *charges for a particular switch transaction* should be the same for all financial institutions in Nebraska is obviously compatible with and supports” the original legislative purpose (emphasis added).

¹¹ Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. No. 111-203, 15 U.S.C. § 1693o-2(c)(8); Federal Reserve Board, Regulation II, 12 C.F.R. § 235.2(j).

¹² ATM transactions are not subject to these Regulation II interchange transaction fee limitations. 12 C.F.R. § 235.2(h)(2).

¹³ 12 C.F.R. § 235.5(a). Regulation II currently specifies that an interchange transaction fee received or charged for an electronic debit transaction is deemed reasonable and proportional if it does not exceed the sum of 21 cents, plus 5 basis points multiplied by the value of the transaction, plus 1 cent if the issuer qualifies for the fraud-prevention adjustment. *Id.* at §§ 235.3(b); 235.4. Regulation II currently provides for certain exemptions from the regulated interchange rate, including exemptions for debit cards issued by small issuers with assets of less than \$10 billion, certain prepaid cards and government-administered benefit cards. *Id.* at § 235.5. Recently, the federal District Court for the District of Columbia held that the Board’s formulation of the interchange transaction fee in Regulation II included impermissible costs. *NACS v. Board of Governors of the Fed. Reserve Sys.*, No. 1:11-cv-02075, mem. op. at 1-2 (D.C. Cir. July 31, 2013). As of the date of this letter, the Board is currently appealing this determination and the District Court decision has been stayed. *NACS v. Bd. Of Governors of Fed. Reserve Sys.*, No. 1:1-02075, mem. order at 2

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If the Department interprets Section 8-157.01's discriminatory pricing prohibition to apply to POS interchange, the unavoidable result would be that debit POS networks would have to set all debit card interchange at merchant locations in Nebraska at or below the federal Regulation II regulated rate in order to satisfy both Nebraska and federal requirements. This would have a significantly detrimental effect on smaller Nebraska financial institution issuers, on behalf of whom Regulation II otherwise permits networks to assess higher, unregulated interchange rates. Indeed, a recent Board study found that Regulation II has resulted in the average interchange collected for signature debit card transactions for smaller issuers being effectively slightly more than double that for non-exempt issuers, and the average interchange collected for PIN debit transactions for smaller issues being effectively 1.3 times greater than for non-exempt issuers.¹⁴ Were the Department to interpret the Section 8-157.01 discriminatory pricing provision to apply to POS debit interchange fees, as a consequence smaller Nebraska financial institution card issuers would likely see their average interchange revenue on debit card transactions within Nebraska reduced by about 45 percent, from a current average of 43 cents per transaction to the regulated amount of an approximate average of 24 cents per transaction.¹⁵

Moreover, if the Department interprets Section 8-157.01's discriminatory pricing provision to apply to POS debit interchange, similar detrimental effects could be expected at transactions in Nebraska for Nebraska financial institution issuers of all sizes of other card types which are similarly exempt from Regulation II's regulated interchange cap, such as reloadable prepaid cards (to the extent deemed covered by SOP #33) and cards issued pursuant to federal, state or local government-administered payment programs.

Further, if their debit interchange is significantly reduced, Nebraska financial institution card issuers would likely impose higher or additional fees, conditions on customers' deposit accounts, or decrease customer services or account features (e.g., requiring higher minimum for free checking, imposing fees for deposit accounts or debit card capability, or restricting services for certain customers) to compensate for their lost interchange fee revenue. This would run directly contrary to the statute's goal of giving

(D.C. Cir. Sept. 19, 2013); *NACS v. Bd. Of Governors of Fed. Reserve Sys.*, No. 13-5270 (D.C. Aug. 21, 2013). If upheld on appeal, the District Court opinion likely will require a significant reduction in the regulated interchange rate for debit card transactions.

¹⁴ Bd. of Governors of the Fed. Reserve Sys., *Impact of Regulation II on Small Debit Card Issuers* (May 23, 2013), available at: http://www.federalreserve.gov/paymentsystems/files/debitfees_impact.pdf.

¹⁵ *Id.* at 2. See also Bd. of Governors of the Fed. Reserve Sys., *2011 Interchange Fee Revenue, Covered Issuer Costs, and Covered Issuer and Merchant Fraud Losses Related to Debit Card Transactions* at 16 (table 5) (March 5, 2013), available at:

http://www.federalreserve.gov/paymentsystems/files/debitfees_costs_2011.pdf.

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customers of Nebraska financial institutions the ability “to access their bank accounts by electronic means.”¹⁶

PIN Debit

Although Visa believes that the Department should defer promulgating regulations as to any POS transaction, we respectfully note that, at a minimum, POS transactions not effectuated through use of a personal identification number (a “PIN”) should not be covered by the Proposed SOP as they are not included within the scope of Section 8-157.01.

ATM and POS systems require the involvement and coordination of many different parties, including financial institutions, processors, retailers, and cardholders. When ATM or POS systems are shared among many financial institutions, the structure of relationships becomes even more complex, and each participant must be bound by interrelated obligations. The POS environment often is more complicated than the ATM environment, because of the central presence of a key non-regulated participant—the retailer. POS debit is a form of electronic payment developed for the retail sector and includes both PIN debit and signature debit.¹⁷ These types of transactions often differ in the input required from the consumer, the debit networks over which the transactions are carried, and the technical mechanics and timing of the transactions.¹⁸

Although the same access device is used, the routing and options relating to PIN debit transactions and signature debit transactions are generally different. A PIN debit transaction can be more like a typical ATM transaction in that both transactions are initiated by a customer with his or her PIN rather than signature, and the customer generally may receive cash back at the register when using a PIN but not when signing for a transaction. Seemingly, the Legislature was aware of this difference in “PIN debit” versus “signature debit” as Section 8-101 provides that a covered “point-of-sale terminal” is a “terminal which utilizes electronic...signals...which are transmitted to a financial institution...to effectuate electronic funds transfer transactions for the purchase...of goods and services *and* which are initiated by an access device *in conjunction with a personal*

¹⁶ AG Opinion 13-001, at 2.

¹⁷ These transactions have historically been called “online” (PIN) and “offline” (signature). For ease of exposition, this letter uses the simpler terms “PIN debit” and “signature debit.”

¹⁸ As the names of the transactions indicate, a customer typically initiates a PIN debit transaction by entering a PIN at the POS terminal and a signature debit transaction by signing a receipt or an electronic screen. A consumer is typically prompted at the POS terminal to choose “credit” or “debit”; when the consumer uses a debit card, a choice of “credit” generally results in a signature debit transaction, while a choice of “debit” generally results in a PIN debit transaction. To conduct a signature debit transaction, the customer typically has a Visa- or MasterCard-branded debit card linked to a deposit account, and the merchant must have an acquiring bank that is a member of the Visa or MasterCard network. The merchant may, but need not, have a POS terminal. (Because a POS terminal is not required for a credit card transaction, it is also not required for a signature debit transaction.)

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identification number." Neb. Rev. Stat. § 8-101(10) (emphasis added). Such express requirement of a "personal identification number" evidences the Legislature's intent that *only* PIN debit is to be included with the strictures of the non-discrimination requirement of Neb. Rev. Stat. § 8-157.01(11).¹⁹ Any other interpretation is against the plain language of the statute.

Recommended Revisions to the Proposed SOP:

For the reasons discussed above, Visa believes it is clear that ATM and POS interchange fees were not intended to be subject to the Nebraska statute. However, for the avoidance of doubt, Visa requests that the Department revise the Proposed SOP to clarify that ATM and POS interchange is not subject to the Section 8-157.01 non-discrimination requirements, by adding the following sentence at the end of the "Determining What Comprises an ATM, POS Terminal, or Switch Fee" section of the Proposed SOP:

"Interchange fees are not included in the definition of "fee" and accordingly are not subject to the Section 8-157.01 non-discrimination requirements."

As discussed above, the numerous pricing mechanisms applicable to POS transactions in today's environment and the comprehensive federal regulatory framework that already governs debit interchange, require a different analysis than that applicable to ATM transactions. Applying these rules to POS interchange on Nebraska transactions would essentially frustrate U.S. Congressional intent in exempting small Nebraska issuers from the debit interchange fee cap, as it would reduce interchange income for small Nebraska financial institution debit card issuers from unregulated, market-based interchange to at most the maximum allowed by Regulation II's regulated interchange cap.²⁰

Alternatively, in the event the Department determines for the reasons above to exclude POS interchange fees from the definition of "fee," we suggest the Department add the following clarification to the end of the "Determining What Comprises an ATM, POS Terminal, or Switch Fee" section of the Proposed SOP:

"Interchange fees paid to a user financial institution which issues an access device used to initiate electronic funds transfer transactions at a point-of-sale terminal, whether paid directly or indirectly through a switch to the user financial institution, are not included in the definition of "fee"

¹⁹ Section 8-157.01(11) provides that "point-of-sale terminals" must "be made available on a nondiscriminating basis to any financial institution."

²⁰ *Supra Impact of Regulation II on Small Debit Card Issuers*, n. 14, at 1 (discussion of Dodd-Frank Act exemption for small debit card issuers from interchange fee standard and concerns raised during the rulemaking about costs on small debit card issuers which are the subject of the Board's study).

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and accordingly are not subject to the Section 8-157.01 non-discrimination requirements.”

If the Department determines not to exclude interchange generally or POS interchange specifically as recommended above, we highly recommend that the Department limit promulgation of the Proposed SOP to ATM fees and defer consideration of the applicability of Section 8-157.01 to all POS-related transaction fees (including interchange) until there has been an opportunity to look at this highly complex and constantly evolving industry in more detail. In the event that the Department takes a different view, however, we respectfully urge the Department to reserve the treatment of interchange in general under Section 8-157.01 for further study following adoption of a revised SOP #33. We would be pleased to work with the Department to assist with its study of this critically important issue for Nebraska financial institution card issuers and their cardholder customers.

Furthermore, if the Department should decide not to defer the applicability of the Proposed SOP to POS transactions, we recommend that it include within the Proposed SOP the following language:

“For purposes of this SOP #33, POS transactions include only those debit transactions which are effected by use of a personal identification number (a “PIN”).”

III. Request for Clarification That a “Switch” Is Not a Nebraska Financial Institution

In paragraph two on page 33-1, the Proposed SOP states that:

For purposes of SOP #33, “Nebraska financial institution” means any state-chartered or federally chartered bank, savings bank, building and loan association, savings and loan association, or credit union, or a subsidiary of any such entity that establishes an ATM or POS terminal within the State of Nebraska, and switches that route electronic transactions for a Nebraska financial institution’s ATM and/or its POS terminal (emphasis added).

This italicized language is new to SOP #33 and to the definition in Section 8-101(12). We question the authority and purpose of this addition, which adds substantial confusion as to the obligations of a switch. To illustrate, we have attached as Exhibit C to this letter a copy of the Proposed SOP showing each use of the word “financial institution” and question how each of these instances can also be applicable to a switch. Moreover, there are numerous other U.S. federal and state statutes and regulations governing “financial institutions” to which Visa and other potential switches are not

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subject; Visa instead generally operates as a service provider to financial institutions. Being deemed a "financial institution" by a particular state's law could lead to significant unintended consequences and confusion with respect to regulatory oversight which is why, where the regulations may apply to Visa or other similar networks, such regulations generally are careful to utilize terms and categories other than "financial institution."²¹ We are concerned that the Proposed SOP's inclusion of switches within the definition of "financial institution" would be inconsistent and create confusion with these other federal and state statutes that are designed to regulate "financial institutions."

Recommended Revisions to the Proposed SOP:

We encourage the Department to avoid this overly-broad, confusing and circular result by deleting:

“, and switches that route electronic transactions for a Nebraska financial institution's ATM and/or its POS terminal”

IV. Request for Clarification of the Geographic Scope of SOP #33

We respectfully suggest that the Department additionally clarify the scope of applicability of the non-discriminatory pricing requirements, in regard to the geographic location of ATMs and POS terminals and cardholder transactions to which Statement of Policy #33 applies as discussed below.

ATMs and POS Terminals Located Outside Nebraska

We suggest that the Department clarify that the non-discriminatory pricing requirements are *not applicable* to charges paid by cardholders of a Nebraska financial institution²² for use at an *ATM or POS located outside the state of Nebraska*. The terms of Section 8-157.01 evidence a clear legislative intent to address discriminatory practices only as to ATMs or POS terminals that are established within the State of Nebraska.²³

Non-Nebraska Financial Institution Cardholders

We also suggest that the Department clarify that the non-discriminatory pricing provisions are *not applicable* to charges for use of a *card issued by a non-Nebraska*

²¹ See, e.g., the Bank Service Company Act, 12 U.S.C. §§ 1861-1867(c) ("bank service company"); Federal Financial Institutions Examination Council Examination Handbooks ("service provider").

²² We use "Nebraska financial institution" as an abbreviated term meaning any state-chartered or federally chartered bank, savings bank, building and loan association, savings and loan association, or credit union, or a subsidiary of any such entity (which is the definition of "financial institution" in Neb. Rev. Stat. § 8-157.01(15)(h)), which has its main office located in the State of Nebraska.

²³ Neb. Rev. Stat. §§ 8-157.01(18); 8-157.01(5); 8-157.01(7).

financial institution at a POS or ATM located in Nebraska. Rather, the terms of Section 8-157.01 make clear that the Nebraska legislature intended to prevent discrimination in the use of a POS or ATM located in Nebraska only by customers of Nebraska financial institutions.²⁴

As noted above, we recommend that a Nebraska financial institution for this purpose be defined as a financial institution whose main office is located in Nebraska. That is, the non-discriminatory pricing provisions should not be applicable to cards issued by a financial institution whose main office is located in another state, notwithstanding that the financial institution may have one or more approved branches in Nebraska. Most if not virtually all of the cardholders of such a financial institution typically would be resident in a state other than Nebraska. It is impossible currently for the network or the establishing financial institution to differentiate the cardholder of the issuing financial institution based on the state of residency of the cardholder. Accordingly, subjecting all debit cards of a financial institution whose main office is located in a state other than Nebraska to these non-discrimination provisions, merely because it has a branch in Nebraska, would also subject a relatively large number of transactions of non-Nebraska resident cardholders to the statute, in contravention of the clear intent of the Nebraska legislature discussed above. Subjecting financial institutions whose main office is located in another state to Section 8-157.01 also would raise difficult jurisdictional issues relative to the state in which the main office is located (for state-chartered financial institutions) or federal preemption (for federally-chartered institutions).²⁵

Finally, AG Opinion 13-001, and the Restraint Of Trade, Commerce Clause and other analyses set forth therein, similarly appears to be limited to ATM and POS

²⁴ See Section 8-157.01(1) ("Such automatic teller machines shall be made available on a nondiscriminating basis for use by customers of any financial institution which has a main chartered office or approved branch located in the State of Nebraska which becomes a user financial institution."); Section 8-157.01(2) ("All automatic teller machines must be made available on a nondiscriminating basis, for use by customers of any financial institution which has a main chartered office or approved branch located in the State of Nebraska which becomes a user financial institution..."); Section 8-157.01(18) ("... usage fees charged for the use of its automatic teller machines by customers of out-of-state financial institutions or foreign financial institutions shall not be considered for purposes of determining if an automatic teller machine located in the State of Nebraska has been made available on a nondiscriminating basis for use by customers of any financial institution which has a main chartered office or approved branch located in the State of Nebraska which becomes a user financial institution"); Section 8-157.01(5) ("A point-of-sale terminal shall be made available on a nondiscriminating basis for use by customers of any financial institution which has a main chartered office or approved branch located in the State of Nebraska which becomes a user financial institution"); and Section 8-157.01(7) ("Following establishment of a point-of-sale terminal, the director, upon notice and after a hearing, may terminate or suspend the use of such point-of-sale terminal if he or she determines that it is not made available on a nondiscriminating basis for use by customers of any financial institution which has a main chartered office or approved branch located in the State of Nebraska which becomes a user financial institution...").

²⁵ For a more detailed discussion of Section 8-157.01 and federally-chartered financial institutions, please see Appendix V of the 2012 Visa Letter.

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transactions occurring in the State of Nebraska involving Nebraska financial institution cardholders. Indeed, the subject of AG Opinion 13-001 is "Non-discriminatory Operation Of And Fees For Switches Used By Automatic Teller Machines And Other Equipment To Transmit Electronic Information For Financial Institutions *in Nebraska*." The first sentence of AG Opinion 13-001 recites the Attorney General's understanding of Section 8-157.01 as creating "standards and rules for automatic teller machines (ATMs), point-of-sale (POS) terminals, and other electronic transmissions by financial institutions *in the State of Nebraska*" (emphasis added).

Visa wishes to point out that, as a practical matter, it would be quite complicated and we estimate substantial infrastructure changes would be needed to our payment network, at significant cost, in order for Visa to enable a determination of whether the card being used at an ATM or POS in Nebraska is issued by a Nebraska financial institution or non-Nebraska financial institution and to enable the application of different pricing based on that determination. These costly infrastructure changes would be necessary even though, as set forth in the 2012 Visa Letter, the volume of Nebraska ATM (and POS) transactions handled by Visa is relatively small. Such required changes would also require a delayed implementation period for compliance with the Proposed SOP as currently drafted.

We further wish to emphasize as discussed above that on a transaction-by-transaction basis, there simply is no way to determine if a given cardholder resides in Nebraska. It also would not be possible to analyze transaction data after settlement and attempt to make adjustments for Nebraska-resident cardholders.

Recommended Revisions to the Proposed SOP:

Visa requests that the Department revise the Proposed SOP to add the following new section to clarify the scope of the Section 8-157.01 non-discrimination requirements:

"Scope of Non-discrimination Requirements

The Section 8-157.01 non-discrimination requirements apply only to transactions at ATMs and POS terminals located in the State of Nebraska initiated by cardholders of Nebraska financial institutions. These requirements do not apply to ATMs or POS terminals located outside of the State of Nebraska or transactions initiated by cardholders of non-Nebraska financial institutions. A Nebraska financial institution for this purpose is a financial institution whose main office is located in the State of Nebraska."

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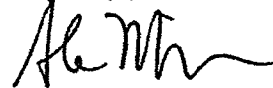
Conclusion

The Proposed SOP raises serious issues with major economic consequences to Nebraska financial institutions and their customers. Prior to implementing such far-reaching changes to longstanding commercial practices within Nebraska, the Department could facilitate broader input on these matters by recommending legislative changes to the Banking, Commerce and Insurance Committee of the Unicameral. The rapidly evolving world of electronic banking presents far greater opportunities for Nebraska financial institutions and their customers now, through the expanding competitive environment, than when the industry was nascent. Equal pricing may no longer be the most beneficial statutory framework to further the legislative goals of this decade. Enforcing prior legislative efforts aimed at access may actually vitiate the benefits of current competition among providers. Perhaps it is again timely for the Legislature to update the statute in this area, as it did in 1993. Visa would be pleased to make recommendations to the Department as to proposed amendments to Section 8-157.01 and the related definitions in Section 8-101.

Despite our view that new legislation may be timely, we continue to believe that the positions in the 2012 Visa Letter are legitimate concerns in connection with this regulatory action under existing law, and that Visa is not a "switch" as defined under Nebraska law. Nonetheless, we wish to reiterate our sincere desire to assist the Department in resolving these issues.

Please do not hesitate to call me if you have any questions regarding our comments in this letter.

Very truly yours,



Alex Miller

cc: Joyce Dixon

EXHIBIT A
DESCRIPTION OF VISA

Visa Inc. ("Visa") is a Delaware incorporated global payments technology company that connects consumers, businesses, banks and governments in more than 200 countries and territories, enabling them to use digital currency instead of cash and checks. Visa operates an open-loop payments network, a multi-party system in which Visa connects financial institutions—issuing financial institutions, or issuers, that issue cards to cardholders, and acquiring financial institutions, or acquirers, that have the banking relationship with merchants—and manage the exchange of information and value between them. As such, Visa does not issue cards, extend credit, or collect, assess or set cardholder fees or interest charges. Cardholder and merchant relationships generally belong to, and are managed by, Visa's network of financial institution clients.

Visa's core processing services involve the routing of payment information and related data to facilitate the authorization, clearing and settlement of transactions between Visa issuers and acquirers. In addition, Visa offers a range of value-added processing services to support its financial institution clients' Visa programs and to promote the growth and security of the Visa payments network. Authorization is the process of approving or declining a transaction before a purchase is finalized or cash is disbursed. Clearing is the process of delivering final transaction data from an acquirer to an issuer for posting to the cardholder's account, the calculation of certain fees and charges that apply to the issuer and acquirer involved in the transaction, and the conversion of transaction amounts to the appropriate settlement currencies. Settlement is the process of calculating, determining, reporting and transferring the net financial position of our issuers and acquirers for all transactions that are cleared.

The issuer and acquirer involved in a typical Visa transaction perform additional functions that Visa does not generally perform or monitor. For example, the acquirer, not Visa, credits the merchant's account for the amount of the transaction less any fees the acquirer charges in accordance with the contractual agreement between the merchant and the acquirer. In addition, the issuer, not Visa, determines whether to issue the card to the issuer's customer, establishes the terms including any fees for the cardholder's use of the card, sends a statement to the cardholder and collects payment, in the case of a credit or deferred debit card, or collects payment directly from the cardholder's deposit account, in the case of a debit card.

Visa offers payment platforms in the U.S. under the Visa, Interlink and PLUS brands. The VisaNet platform is used to process Visa credit card, debit card, prepaid card and other Visa card transactions throughout the world. VisaNet consists of multiple synchronized processing centers, including data centers in the United States. In addition, Visa Europe operates processing centers in the United Kingdom, which are part of Visa's synchronized system. These centers are linked by a global telecommunications network and are engineered for redundancy. Intelligent access points around the world complete

Visa's global processing infrastructure and enable merchants and financial institutions worldwide to access Visa's core processing and value-added services.

In the United States, Visa also provides the Interlink debit product platform. Interlink is a PIN-always, single-message platform generally for U.S. domestic transactions. U.S. issuers can choose to enable Interlink on a Visa debit card, and U.S. merchants can choose Interlink as a PIN-always point of sale acceptance option. Interlink is available as a routing alternative on both Visa and non-Visa-branded debit cards. Visa's financial institution clients also can provide global cash access to their cardholders by issuing products accepted at Visa and PLUS branded ATMs. Most Visa branded cards offer cash access at ATMs, as well as at branches of Visa's participating financial institution clients. The PLUS brand may also be included on issuers' non-Visa branded cards to offer international cash access as a complement to domestic cash access services.

EXHIBIT B
FORM OF PROPOSED SOP #33
INCORPORATING RECOMMENDATIONS OF VISA

[See following page]

B-1

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STATEMENT OF POLICY # 33
ELECTRONIC TERMINAL ACCESS
AND ELECTRONIC SWITCHING OF TRANSACTIONS

The Nebraska Department of Banking and Finance ("Department") sets forth Statement of Policy #33 ("SOP #33") regarding automated teller machine (ATM) and point-of-sale (POS) terminal access and the electronic switching of transactions. Neb. Rev. Stat. § 8-157.01 is SOP #33's legislative focal point.

For purposes of SOP #33, "switch" means any facility where electronic impulses or other indicia of a transaction originating at an ATM or POS terminal are received and are routed and transmitted to a financial institution, data processing center, or other switch, wherever located. A switch may also be a data processing center. For purposes of SOP #33, "Nebraska financial institution" means any state-chartered or federally chartered bank, savings bank, building and loan association, savings and loan association, or credit union, or a subsidiary of any such entity that establishes an ATM or POS terminal within the State of Nebraska, and switches that route electronic transactions for a Nebraska financial institution's ATM and/or its POS terminal.

Access to ATMs and POS Terminals

Customers can access their financial institution accounts electronically through an ATM or POS terminal established by their own financial institution or another, affiliated or unaffiliated, financial institution. If access is through another financial institution, that institution is considered an "establishing financial institution." The accessing customer's Nebraska financial institution is considered a "user financial institution." The user financial institution, through its customer, uses the establishing financial institution's ATM or POS terminal.

Section 8-157.01(2) provides:

All automatic teller machines must be made available on a nondiscriminating basis, for use by customers of any financial institution which has a main chartered office or approved branch located in the State of Nebraska which becomes a user financial institution, through methods, fees, and processes that the establishing financial institution has provided for switching transactions.

Section 8-157.01(5) provides:

A point-of-sale terminal may be established at any point within this state. A financial institution may contract with a seller of goods and

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services or any other third party for the operation of point-of-sale terminals. A point-of-sale terminal shall be made available on a nondiscriminating basis for use by customers of any financial institution which has a main chartered office or approved branch located in the State of Nebraska which becomes a user financial institution. Nothing in this subsection shall prohibit payment of fees to a financial institution which issues an access device used to initiate electronic funds transfer transactions at a point-of-sale terminal.

Fees for ATM and POS transactions are to be nondiscriminatory. If the user financial fees are not equal, the establishing financial institution must be able to show how the fee is nondiscriminatory. (See, Nebraska Attorney General Opinion #92124, "Fee Arrangements Regarding Use of Electronic Terminals (ATMs) By Financial Institutions" at ago.ne.gov.)

There are two limited statutory exceptions that allow for the charging of fees that would otherwise be discriminatory. The first exception for ATM fees is found in Section 8-157.01(1); that provision does not require the charging of ATM fees between affiliate financial institutions. The second exception for ATM fees is found in Section 8-157.01(18), which allows a Nebraska financial institution to participate in a national automatic teller machine program.

An establishing institution is not required to offer the same services at each of its ATMs or POS Terminals.

Access to Switches

Section 8-157.01(10) provides that:

All financial institutions shall be given an equal opportunity for the use of and access to a switch, and no discrimination shall exist or preferential treatment be given in either the operation of such switch or the charges for use thereof. The operation of such switch shall be with the approval of the director. Approval of such switch shall be given by the director when he or she determines that its design and operation are such as to provide access thereto and use thereof by any financial institution without discrimination as to access or cost of its use.

The statutory language regarding switch fees is more emphatic than the language regarding ATM and POS fees. Charging an equal fee for the same switch transaction is a mandate of Section 8-157.01(10). (See, Nebraska Attorney General Opinion #13-001, "Non-discriminatory Operation Of And Fees For Switches Used By Automatic Teller Machines And Other Equipment To

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Transmit Electronic Information for Financial Institutions in Nebraska" at ago.ne.gov.)

Scope of Nondiscrimination Requirements

The Section 8-157.01 non-discrimination requirements apply only to transactions at ATMs and POS terminals located in the State of Nebraska initiated by cardholders of Nebraska financial institutions. These requirements do not apply to ATMs or POS terminals located outside of the State of Nebraska or transactions initiated by cardholders of non-Nebraska financial institutions. A Nebraska financial institution for this purpose is a financial institution whose main office is located in the State of Nebraska.

Determining What Comprises an ATM, POS Terminal, or Switch Fee

The Department has determined that all costs and benefits associated with an ATM, POS terminal, or switch transaction are included in the definition of "fee." the non-discrimination aspects of Section 8-157.01 should apply generally to transaction fees charged directly by Nebraska establishing financial institutions and by switches to a Nebraska user financial institution for processing an electronic ATM transaction by a customer of the user financial institution for the same transaction. For purposes of SOP #33, processing fees include those costs per transaction which are assessed by a switch against a Nebraska financial institution, whether an establishing financial institution or a user financial institution, based on the authorization, clearing and settlement of a specific transaction effectuated through an ATM.

These costs and benefits include, but are not limited to: all transactional charges, a signing bonus, a membership fee, volume pricing, discounts, the awarding of "prizes," period(s) where fees are not charged, incentive pricing, and related items.

ATM Surcharges

Section 8-157.01(4) allows for an ATM transaction surcharge. Prior notice of the surcharge must be provided to the ATM customer. The required notice is listed in Section 8-157.01(4).

[Treatment of POS Fees under Section 8-157.01]

Due to the potential market difficulties of subjecting POS fees to the non-discrimination requirements, the Department shall carry out an internal study and evaluation to determine whether it is necessary, in order to further the non-discrimination purposes of Section 8-157.01, to apply the non-discrimination aspects of Section 8-157.01 to POS fees. The study and evaluation shall, to the extent feasible, be based on information independently developed (by the Department) and information provided to the Department by interested parties. The Department's policy on the treatment of POS fees under Section 8-157.01 and

the applicability of this SOP#33 to POS fees shall be deferred until such additional evaluation, study and consideration can be completed by the Department and applicable regulations subsequently promulgated.]

Or alternatively

[POS Transactions

For purposes of this SOP #33, POS transactions include only those debit transactions which are effected by use of a personal identification number (a "PIN").

Interchange fees are not included in the definition of "fee" and accordingly are not subject to the Section 8-157.01 non-discrimination requirements.

Interchange fees paid to a user financial institution which issues an access device used to initiate electronic funds transfer transactions at a point-of-sale terminal, whether paid directly or indirectly through a switch to the user financial institution, are not included in the definition of "fee" and accordingly are not subject to the Section 8-157.01 non-discrimination requirements.]

Appendix A

Appendix A sets forth "equal access" by way of written examples and by diagram.

Applying to Become an ATM, POS Terminal, or Switch

All ATMs and POS terminals are established by a financial institution. There is no ATM or POS terminal application; however, the Director can ask a financial institution for a listing of all its ATMs or POS terminals. In addition, the Director may use his or her enforcement powers if appropriate.

Entities seeking to operate an electronic switch in Nebraska must apply for approval using the Department "Application for Switch Approval" or "Notice of Switch Approval for a Federally Chartered Financial Institution." The forms for approval or notification are available at www.ndbf.ne.gov or upon request from the Department.

The switch must show that it provides equal access to all Nebraska financial institutions and that the switch will operate in accordance with Section 8-157.01(10).

This Statement of Policy is effective _____, 2013.

Effective Date: March 1, 2012

Revised: September 18, 2012
_____, 2013

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APPENDIX A

Applying SOP #33

(1) ATM and POS Terminal Fee. Bank A and Bank B offer debit cards. The debit cards are issued by Banks A and B, or a third-party issues the card on the bank's behalf. Bank A and Bank B must charge equal ATM and POS terminal fees to each financial institution that becomes a user financial institution of establishing Bank A or Bank B's ATM or Point of Sale terminal, unless Bank A or Bank B can demonstrate why a non-equal fee is nondiscriminatory, pursuant to Section 8-157.01.

Bank A and Bank B are responsible for the ATM or POS terminal fee that is charged to a user institution. In the diagram shown in (3) below, a user financial institution is represented by both Bank Y and Bank Z. Bank A and Bank B can charge fees to user financial institutions Bank Y and Bank Z.

Bank A's ATM and POS terminal fees may be different than the ATM or POS terminal fee that Bank B charges user financial institutions for the same transaction. That is allowed. However, Bank A must charge all user financial institutions the same fee for the same type of transaction. Bank B must charge all of its user financial institutions the same fee for the same type of transaction.

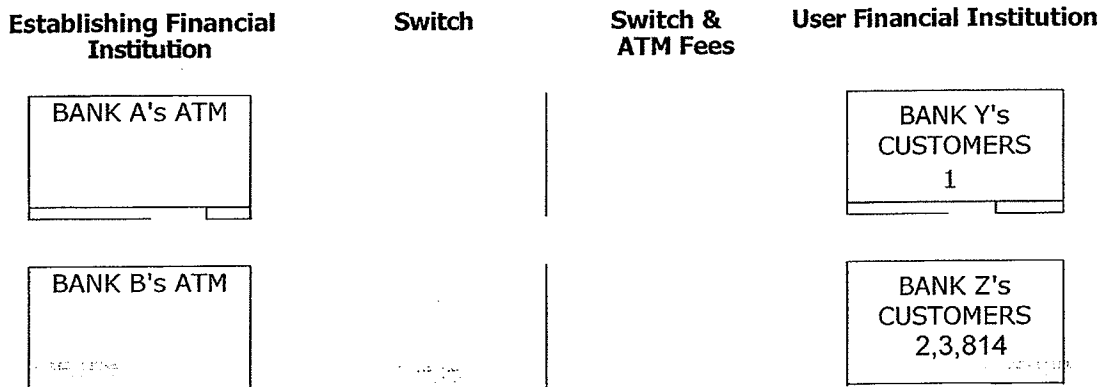
The total transaction cost of a Bank A or Bank B ATM or POS terminal transaction may vary to a user financial institutions due to the use of a particular switch (see diagram, customers 2 and 3). Switch fees influence the overall cost of the ATM or POS terminal transaction.

(2) Switch Fee. Switch D must charge the same fee for the same transaction to Bank A and Bank B. Likewise, switch E must charge the same fee for the same transaction to Bank A and Bank B. However, switches D and E may have fees that are different from one another. Each switch is responsible for charging equal fees for the same transaction it provides in an ATM or POS terminal transaction.

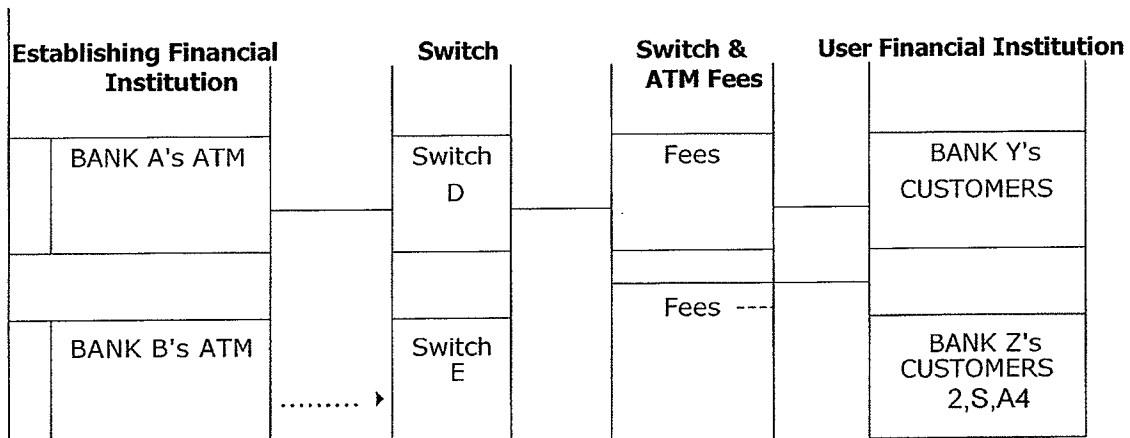
(3) Diagram of ATM, POS, and Switch Transaction (see next page).

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APPENDIX A (continued)



- Bank Y has Customer II that uses Bank A's ATM.
- Bank Z has three customers. One Customer 2 uses Bank A's ATM. Customers 2 and 41 use Bank B's ATM.
- For purposes of the Appendix A diagram, Customers 1,2,3, and 4 each conduct the same type of ATM transaction.



- Bank A must charge Bank Y and Bank Z the same ATM fee, unless Bank A meets a statutory exclusion or the fee is otherwise nondiscriminatory.
- Switch E must charge Bank A and Bank B the same fee for the same type of transaction
- For a Point of Sale transaction, replace "ATM" with POS.

EXHIBIT C
DRAFT OF SOP #33 SHOWING USE OF "FINANCIAL INSTITUTION(S)"

[See following page]

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STATEMENT OF POLICY # 33

ELECTRONIC TERMINAL ACCESS AND ELECTRONIC SWITCHING OF TRANSACTIONS

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services or any other third party for the operation of point-of-sale terminals. A point-of-sale terminal shall be made available on a nondiscriminating basis for use by customers of any financial institution which has a main chartered office or approved branch located in the State of Nebraska which becomes a user financial institution. Nothing in this subsection shall prohibit payment of fees to a financial institution which issues an access device used to initiate electronic funds transfer transactions at a point-of-sale terminal.

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Appendix A

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The switch must show that it provides equal access to all Nebraska financial institutions and that the switch will operate in accordance with Section 8-157.01(10).

This Statement of Policy is effective _____, 2013.

Effective Date: March 1, 2012

Revised: September 18, 2012

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APPENDIX A

Applying SOP #33

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Bank A and Bank B are responsible for the ATM or POS terminal fee that is charged to a user institution. In the diagram shown in (3) below, a user financial institution is represented by both Bank Y and Bank Z. Bank A and Bank B can charge fees to user financial institutions Bank Y and Bank Z.

Bank A's ATM and POS terminal fees may be different than the ATM or POS terminal fee that Bank B charges user financial institutions for the same transaction. That is allowed. However, Bank A must charge all user financial institutions the same fee for the same type of transaction. Bank B must charge all of its user financial institutions the same fee for the same type of transaction.

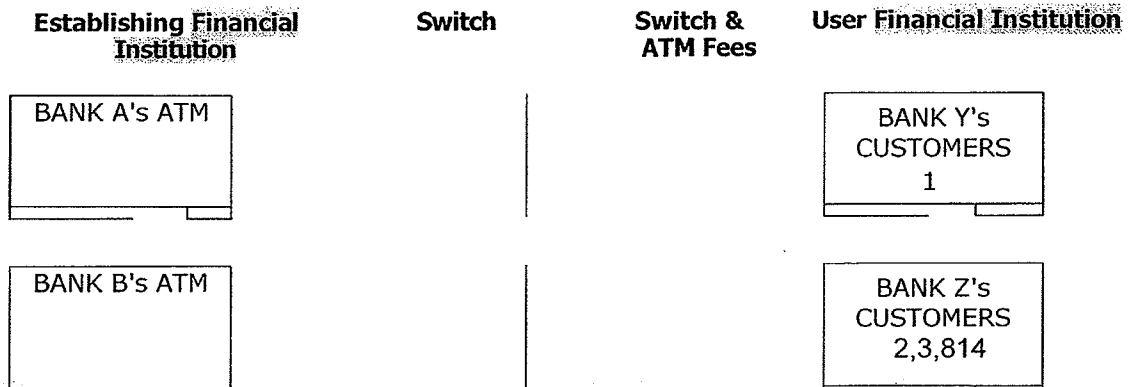
The total transaction cost of a Bank A or Bank B ATM or POS terminal transaction may vary to a user financial institutions due to the use of a particular switch (see diagram, customers 2 and 3). Switch fees influence the overall cost of the ATM or POS terminal transaction.

(2) Switch Fee. Switch D must charge the same fee for the same transaction to Bank A and Bank B. Likewise, switch E must charge the same fee for the same transaction to Bank A and Bank B. However, switches D and E may have fees that are different from one another. Each switch is responsible for charging equal fees for the same transaction it provides in an ATM or POS terminal transaction.

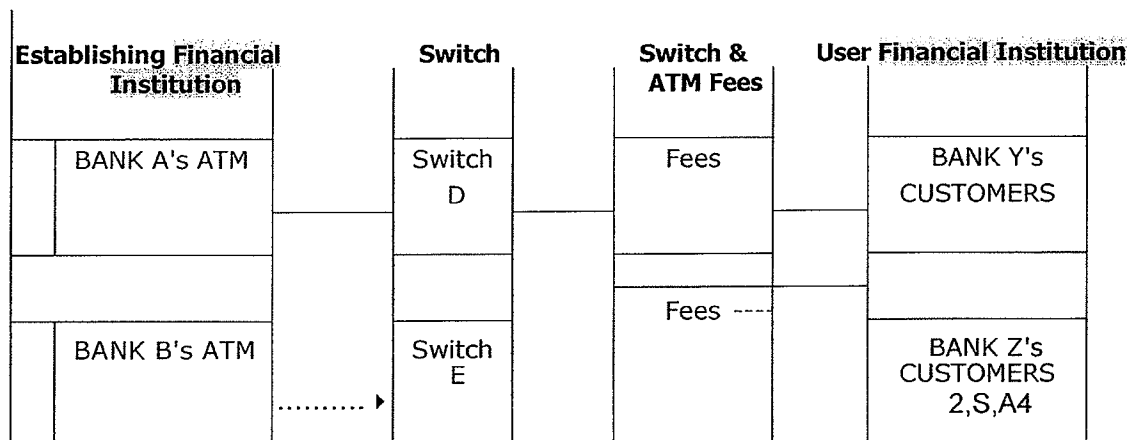
(3) Diagram of ATM, POS, and Switch Transaction (see next page).

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APPENDIX A (continued)



- Bank Y has Customer II that uses Bank A's ATM.
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- Switch E must charge Bank A and Bank B the same fee for the same type of transaction
- For a Point of Sale transaction, replace "ATM" with POS.

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October 23, 2013

Michael W. McDannel – Financial Institutions Legal Counsel
Nebraska Department of Banking & Finance
P.O. Box 95006
Lincoln, NE 68509-5006

Dear Mr. McDannel:

I write on behalf of the Nebraska Bankers Association, Inc. (NBA) in response to the Department's request for comments regarding Proposed Revisions to Statement of Policy (SOP) #33 "Electronic Transaction Fees." We believe that the SOP accurately reflects the statutory mandate of nondiscriminatory fees under Neb.Rev.Stat. Section 8-157.01 and as set forth in recently issued Attorney General Opinion 13-001 by requiring "equal fees for the same service" relating to switch and ATM transactions.

The statutory provisions governing ATM transactions and the fees to be charged by and between financial institutions are based upon the objective of providing nondiscriminatory access to all bank customers and prohibiting discrimination in the charges that a user financial institution pays for that access. The proposed SOP adequately and appropriately addresses the issue of requiring equal fees for ATM transactions. However, we would recommend that the Department consider clarifying the proposed SOP to address the manner in which the Department will process and handle cases in which an establishing financial institution is charging unequal user financial fees and is required to show how the fee is nondiscriminatory.

The NBA also believes that the proposed SOP, in accordance with Attorney General Opinion 13-001, properly reflects that an equal fee for the same switch transaction is mandated.

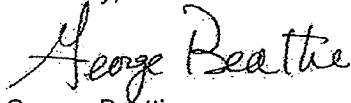
It is vitally important that discriminatory fees for the same service provided in connection with an ATM, POS terminal or switch transaction be prohibited, irrespective of whether such fees are imposed directly or indirectly. As such, the NBA supports the breadth of the definition of "fee" under the proposed SOP and the Department's inclusion of all "costs and benefits" within the definition of "fee."

The NBA supports and believes that the examples reflected at Appendix A accurately depict the manner in which nondiscriminatory fees are to be determined for the same type of ATM transaction.

We believe that the Department, for purposes of future enforcement actions, should consider adopting the provisions of proposed SOP #33 in the form of a formal rule. In the event that such action is not taken at this time, we would encourage the Department to adopt SOP #33 as an interim measure, but proceed with formal rulemaking so that regulations governing the subject matter are adopted and Administrative Procedures Act provisions are applicable. The adoption of a formal regulation would be particularly helpful in addressing issues relating to the review and determination of potential challenges in cases involving unequal user financial institution fees. A formal regulation could also provide guidance regarding the burden of proof, the elements of proof, the procedure for evaluating proof and the nature of the evidence required to establish that unequal user financial institution fees are nondiscriminatory.

The SOP accurately reflects the long-standing interpretation of the requirement for nondiscriminatory access and fees in connection with ATM and switch transactions. The SOP provides clarity to ensure that switches and establishing financial institutions comply with their responsibility under state law to provide "equal fees for the same service." The Department is to be commended for their efforts in responding to the contents of Attorney General Opinion 13-001 and for the proposed revisions to the SOP that have been issued for comment by the Department.

Sincerely,

A handwritten signature in cursive script that reads "George Beattie".

George Beattie
President & CEO
Nebraska Bankers Association



Michael W. McDannel
October 18, 2013
Page 1 of 2

October 23, 2013

Mr. Michael W. McDannel – Financial Institutions Legal Counsel
Nebraska Department of Banking & Finance
P.O. Box 95006
Lincoln, NE 68509-5006

Dear Mr. McDannel:

I write on behalf of the Nebraska Electronic Transfer System, Inc. (NETS) in response to the Department's request for comments regarding Proposed Revisions to Statement of Policy #33 "Electronic Transaction Fees." The Department is to be commended for the proposed revisions to SOP #33 in light of the recent issuance of Attorney General Opinion 13-001.

Access to ATMs and POS Terminals

We believe that the proposed SOP adequately and appropriately addresses the issue of requiring equal fees for ATM transactions. However, we would recommend that the Department consider clarifying the proposed SOP to address the manner in which the Department will process and handle cases in which an establishing financial institution is charging unequal user financial fees and is required to show how the fee is nondiscriminatory. (The Department may want to change references throughout the SOP to "unequal user financial fees" to "unequal user financial institution fees.")

Access to Switches

The proposed SOP, in accord with recent Attorney General Opinion 13-001, properly reflects that an equal fee for the same switch transaction is mandated.

Determining What Comprises an ATM, POS Terminal or Switch Fee

NETS supports the breadth of the definition of "fee" under the proposed SOP. The inclusion of all "costs and benefits" associated with an ATM, POS terminal or switch transaction should ensure that discriminatory fees for the same service will not occur on either a direct or indirect basis.

Appendix A

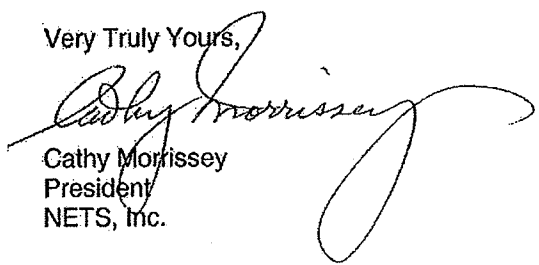
The examples reflected at Appendix A accurately depict the manner in which nondiscriminatory fees are to be determined for the same type of ATM transaction. The Department may want to consider revising the text under the heading "Appendix A" on page 33-3 of the SOP to read "Appendix A sets forth "equal access" and "nondiscriminatory fees" by way of written examples and by diagrams."

General Comments

We believe that the Department, for purposes of future enforcement actions, should give consideration to adopting the provisions of proposed SOP #33 in the form of a formal rule. In the event that such action is not taken at this time, we would encourage the Department to adopt SOP #33 as an interim measure, but consider proceeding with formal rule making so that regulations governing the subject matter are adopted and Administrative Procedures Act provisions are applicable. The adoption of a formal regulation would be particularly helpful in addressing issues relating to the review and determination of potential challenges in cases involving unequal user financial institution fees. A formal regulation could also provide guidance regarding the burden of proof, the elements of proof, the procedure for evaluating proof and the nature of the evidence required to establish that unequal user financial institution fees are nondiscriminatory.

As I have communicated previously, our goal at NETS truly is to keep our member institutions at the heart of our review of this draft Statement of Policy. So once again, on behalf of NETS, I would like to thank the Department for their efforts in responding to the contents of Attorney General Opinion 13-001 and for the proposed revisions to SOP #33 that have been issued for comment by the Department.

Very Truly Yours,



Cathy Morrissey
President
NETS, Inc.



October 2, 2013

Mr. Michael McDannel
Department Legal Counsel / Financial Institutions
Nebraska Department of Banking and Finance
P.O. Box 95006
Lincoln, NE 68509

RE: First Data's Comments to Statement of Policy #33, Relating to Electronic Terminal Access and Electronic Switching of Transactions

Dear Mr. McDannel:

On behalf of First Data, I appreciate your consideration of these written comments as the Department of Banking and Finance weighs its proposed changes to the Statement of Policy (SOP) #33.

By way of background, First Data is a leading processor of electronic payment transactions and is one of Nebraska's largest private sector employers. In Omaha, we employ approximately 6,000 people and pay nearly \$300 million in wages annually. Omaha represents our largest single employee footprint of any First Data facility within the 36 countries in which we operate. Additionally, we own and operate the STAR® Network, a coast-to-coast electronic payments network.

As an owner and operator of the STAR debit network, which is an approved switch in the state, we are directly impacted by the draft SOP #33. Our overarching concern with the interpretation of the nondiscriminatory pricing policy is that it takes the pricing control out of the hands of the debit networks and their member financial institutions – entities who are best suited to make the most favorable pricing decisions about transactions that run across their network rails – and places it in the hands of the state. Nebraska would be the only state in the country with this approach that is relatively unfavorable to debit networks as well as state-chartered, regional, and national financial institutions.

Generally, STAR prices its switch fees based on numerous factors, including transaction volume, asset size, strategic value, number of services contracted with First Data and the STAR Network, etc., and we referenced this pricing differentiation when we applied to the Department for approval as a switch in the state. The Department did not mention the discriminatory pricing requirement when it granted STAR's approval.

Pricing restrictions on switch fees would adversely impact First Data's business model and growth opportunities by limiting device availability and competitive pricing. Operationally, having one set pricing amount for all network fees for customers in the State of Nebraska may sound relatively straightforward, but it may be challenging to maintain separate pricing for Nebraska institutions and transactions. Moreover, some nationwide or regional financial institutions that have branches in other states in addition to Nebraska may not agree with the prices that are ultimately chosen by the network, especially if those institutions have negotiated more favorable prices in other states.

There are inherent risks to picking a rate that is economically favorable to the network and its member financial institutions without regard for any of the criteria by which we normally price our product offerings, such as transaction volume. In addition, supporting a unique pricing system in Nebraska would take considerable programming efforts and thus additional time to complete such efforts.

We also question how this draft SOP #33 is intended to work within the confines of the Durbin amendment, enacted into law in 2010 as part of the federal Dodd-Frank Wall Street Reform and Consumer Protection Act. Section 1075 (the Durbin amendment) requires that issuers charge and receive debit interchange rates that are reasonable and proportional to the cost of each debit transaction.

However, the law provides an exemption for issuers that have less than \$10 billion in worldwide banking assets. Thus, across the United States, debit issuers with more than \$10 billion in banking assets are restricted to a debit interchange rate set biannually by the Federal Reserve Board, while issuers with less than \$10 billion in banking assets are not. The regulated rate is currently set at 21 cents plus 5 basis points of the value of the transaction plus an additional penny if the issuer meets certain fraud prevention standards.

If a switch operating in Nebraska is not able to bifurcate debit interchange rates for covered financial institutions and exempt financial institutions under federal law – as is currently the case in the rest of the 49 states – it would appear to be a significant disadvantage especially for Nebraska community banks and credit unions (the institutions largely exempt under the Durbin amendment), as they would be forced to accept a state-mandated reduced interchange rate lower than they may otherwise be entitled.

It's important to note as well that for point of sale debit transactions, interchange is not often a fee to financial institutions, but it is instead revenue. Given the federal governance over debit interchange and the fact that interchange often serves as revenue versus a fee, we believe interchange should be excluded from the scope of SOP #33.

Before we are able to provide a more comprehensive opinion on the draft SOP #33, we would appreciate if the Department could comment on how it intends to reconcile this non-discriminatory pricing approach with the regulated and unregulated debit interchange rate structure provided under the Durbin amendment as well as comment on how state regulated pricing is more advantageous to financial institutions, consumers, merchants and ATM providers than competitive pricing practices generally available throughout the United States.

Thank you for consideration of these comments, and we look forward to working with the Department as it prepares for a final version of SOP #33.

Sincerely,



Kimberly Ford

Vice President of Public Affairs

(303) 967-7174

kim.ford@firstdata.com